

No. 05-477 OCT 11 2005

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In The  
**Supreme Court of the United States**

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DOUBLE EAGLE HOTEL & CASINO,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Tenth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS ERRED IN IMPORTING A CONSTITUTIONAL OVERBREADTH STANDARD INTO THE ARENA OF NATIONAL LABOR RELATIONS ACT JURISPRUDENCE, IN DIRECTING AN EMPLOYER TO OFFER REINSTATEMENT TO AN EMPLOYEE WHO WAS TERMINATED FOR CONDUCT THAT THE EMPLOYER COULD LAWFULLY PROSCRIBE.
- II. WHETHER THE COURT OF APPEALS' NEWLY CRAFTED OVERBREADTH RULE AND REMEDY CONFLICTS WITH SECTION 10(c) OF THE NATIONAL LABOR RELATIONS ACT AND CONFLICTS WITH THIS COURT'S DECISION IN *N.L.R.B. v. TRANSPORTATION MANAGEMENT CORP.* AND THE DECISIONS OF ALL OF THE CIRCUIT COURTS OF APPEALS UPHOLDING AND APPLYING THE BOARD'S *WRIGHT LINE* TEST.
- III. WHETHER THE COURT OF APPEALS ERRED IN ADOPTING A RULE THAT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, BY HOLDING THAT A WORKPLACE RULE PROHIBITING DISCLOSURE OF CONFIDENTIAL EMPLOYEE INFORMATION VIOLATED SECTION 8(a)(1) OF THE NATIONAL LABOR RELATIONS ACT, WHERE NO REASONABLE EMPLOYEE WOULD BELIEVE THE RULE RESTRICTED AN EMPLOYEE'S RIGHT TO DISCUSS HIS OR HER OWN TERMS OF EMPLOYMENT.

**RULE 29.6 CORPORATE  
DISCLOSURE STATEMENT**

Petitioner Double Eagle Hotel & Casino ("Double Eagle") is owned and operated by Double Eagle Resorts, Inc., a privately held Colorado corporation. Double Eagle Resorts, Inc. is wholly owned by Colorado Casino Resorts, Inc., a privately held Texas corporation. No publicly held company owns 10% or more of the stock of Colorado Casino Resorts, Inc. or Double Eagle Resorts, Inc.

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## **OPINION BELOW**

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 414 F.3d 1249 (10th Cir. 2005). A copy of this opinion is attached hereto at pages 1 through 21 of the Appendix. The Decision and Order of the National Labor Relations Board, Cases 27-CA-17816-2 and 27-CA-18048-1 is attached hereto at pages 22 through 44 of the Appendix. The Decision of the Administration Law Judge in Cases 27-CA-17816-2 and 27-CA-18048-1 is attached hereto at pages 45 through 71 of the Appendix.

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## **JURISDICTION**

The Court of Appeals for the Tenth Circuit issued its opinion in this matter on July 13, 2005. No Petition for Rehearing was filed. This Court has jurisdiction to review the decision of the Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

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## **STATUTORY PROVISIONS INVOLVED**

29 U.S.C. § 157

(National Labor Relations Act, Section 7)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement

requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a)(1)

(National Labor Relations Act, Sections 8(a)(1), 8(a)(2) and 8(a)(3))

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it:

Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after

the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 160(c)  
(National Labor Relations Act, Section 10(c))

\* \* \*

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

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**STATEMENT OF THE CASE**

Double Eagle seeks review of the July 13, 2005 Order of the Tenth Circuit Court of Appeals ("the Court") affirming a decision of the National Labor Relations Board ("NLRB"), which directed Double Eagle to offer reinstatement and back pay to certain employees who were disciplined for violating a policy against discussing tips on the Double Eagle's casino gaming floor. Although the Court acknowledged that Double Eagle could lawfully proscribe the discussion of tips on the gaming floor, and specifically found that the employees were disciplined solely for engaging in conduct that could lawfully be proscribed, the Court upheld the back pay and reinstatement order because the NLRB had found that Double Eagle's policy *also* prohibited discussion of tips in areas outside the casino gaming floor. In order to uphold the NLRB's mandated remedy for employees whose conduct was legally disciplined, the Court imported a constitutional "overbreadth" doctrine into the realm of labor-management relations, which is governed by the National Labor Relations Act ("NLRA"). The Court of Appeals' decision effects an unwarranted importing of the constitutional overbreadth doctrine into a dispute under the NLRA and